No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SUSAN B. ERZINGER, et al

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

I. MAY A STUDENT WHOSE RELIGION FORBIDS FINANCIAL SUPPORT FOR ABORTION BE COMPELLED BY A STATE UNIVERSITY TO CONTRIBUTE TO THE COST OF ABORTIONS FOR OTHER STUDENTS NOTWITHSTANDING 42 U.S.C. § 300a-7[c,d] WHICH PROHIBITS DENIAL OF ADMISSION OR ENROLLMENT "FOR TRAINING OR STUDY BECAUSE OF ... RELUCTANCE ... TO IN ANY WAY PARTICIPATE IN THE PERFORMANCE OF ABORTIONS ... CONTRARY TO OR CONSISTENT WITH ... RELIGIOUS BELIEFS OR MORAL CONVICTIONS"?

II. MAY A STATE UNIVERSITY EXPEL OR REFUSE TO ADMIT STUDENTS WHO REFUSE TO CONTRIBUTE TO THE SUPPORT OF NON-EDUCATIONAL AND POLITICAL ACTIVITIES WHICH ARE RELIGIOUSLY, IDEOLOGICALLY AND POLITICALLY REPUGNANT TO THEM?

III. SHOULD THIS COURT RESOLVE THE CONFLICT BETWEEN THE CALIFORNIA STATE COURTS AND THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT RESPECTING THE ASSOCIATIONAL RIGHTS OF UNIVERSITY STUDENTS WHO OBJECT TO THE USE OF MANDATORY STUDENT FEES FOR NONEDUCATIONAL AND/OR POLITICAL PURPOSES?

IV. MAY A CALIFORNIA STATE COURT DECLARE AS A MATTER OF FEDERAL LAW THAT THERE IS NO INTERFERENCE WITH PROTECTED RELIGIOUS ACTIVITY BY STUDENTS WHERE IT IS UNDISPUTED THAT THE STUDENTS' REFUSAL TO PAY FOR ABORTIONS WAS SINCERELY HELD, RELIGIOUSLY BASED, AND WILL RESULT IN EXPULSION FROM THE STATE UNIVERSITY?

PARTIES: Petitioners are Susan B. Erzinger, Margaret G. Patton, Albin A. Rhomberg, Robert Francis Arnez, Jr., Tse-Ling Fong, Lew Goldberg, Erich B.

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE. 4

REASONS FOR GRANTING THE WRIT 18

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND IS SQUARELY IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. 18

A. It Is Well-Settled That Objection To Coerced Payment Of Money For Causes And Activities Opposed On Religious Or Political Grounds By The Person Forced To Make The Payment States A First Amendment Claim When

Page

The Party Coercing The Payment Is An Agency Of The State. . . . 18

B. The Holding Of The California Court Of Appeal Is In Conflict With This Court's Rulings Respecting The Power Of Any Court To Second-Guess A Matter Of Religious Belief 30

II. THE CALIFORNIA COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CIVIL RIGHTS LAW IN A MANNER INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE AND THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN RELATED CASES. 35

A. As A Recipient Of Federal Public Health Funds, The University Of California May Not Deny Admission To Any Person Because They Refuse To Participate "In Any Way" In An Abortion Subsidy Program. 35

Page

1. The Construction Of 42 U.S.C. § 300a- 7[d,e] by the Court of Appeal is Clearly Erroneous. 35

CONCLUSION 44

CERTIFICATION OF SERVICE 46

APPENDIX

Opinion of November 16, 1982 California Court of Appeal . . . 1a

Notice of Entry of Order Denying a Hearing, dated January 27, 1983, California Supreme Court. . . . 17a

Order Granting Rehearing 18a

Opinion of September 21, 1982 . . 20a

Oral Opinion of April 24, 1980, Superior Court, San Diego County. 34a

Excerpts from Record Showing Assertion of Federal Claims

Petition for Rehearing to Court of Appeal. 47a

Excerpt from Brief in Court of Appeals 70a

Excerpt from Petitioners' Trial Court Brief. 73a

TABLE OF AUTHORITIES

Page(s)

Abood v. Detroit Board of Education, 431 U.S. 209 (1977). . . 16, 19, 22, 23, 24, 27, 29

Anderson v. General Dynamics Convair Aerospace Division, 589 F.2d 397 (9th Cir. 1978) 33

Beck v. Communications Workers of America, 468 F. Supp. 87 (D. Md. 1979) 28

Buckley v. Valeo, 424 U.S. 1,(1976). 20

Burns v. Southern Pacific Transp. Co., 589 F.2d 403 (9th Cir. 1979), cert. den. 439 U.S. 1072 (1979). 17, 19, 33, 34, 43

Carlson v. Portland, 45 Ore. App. 439, 608 P.2d 1198 (1980). 30

Cooper v. General Dynamics, 533 F.2d 163, cert. den., 433 U.S. 908 (1977). 43

Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982), rev'g in part, 516 F. Supp. 1142 (D.N.J. 1981) 17, 19, 21, 22, 27, 29, 30, 45

Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979). 30

Good v. Assoc. Students of the University of Washington, 86 Wash.2d 94, 542 P.2d 762 (1975). 27

Page

International Assn. of Machinists v. Street, 367 U.S. 740 (1961) 28

Haring v. Blumenthal, 471 F. Supp. 1172 (D.D.C. 1979). 44

Harris v. McRae, 448 U.S. 297 (1980). 6, 7, 26, 35

Jensen v. Yonamine, 437 F. Supp. 368 (D. Hawaii 1977). 29

Let's Help Florida v. Smathers, 453 F. Supp. 1003, 1007 (N.D. Fla. 1978). 28

New Left Educational Project v. Bd. of Regents of the University of Texas, System, 326 F. Supp. 158 (W.D. Tex., 1970) 28

Roe v. Wade, 410 U.S. 113 (1973) . . . 35

Rosano v. United States Marine Corps, -- Ct. Cl. -- (slip opinion, No. 6-81, filed January 19, 1982) 34, 44

Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981). 17, 31, 32, 33, 43

Tooley v. Martin-Marietta, Corp., 648 F.2d 1239 (9th Cir. 1981) 19, 44

Torcaso v. Watkins, 367 U.S. 488 (1961). 17

United States v. Lee, 102 S.Ct. 1051 (1982) 21

Page

Virginia State Bd. of Pharmacists v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 28

Warner v. Board of Eduction, 99 Misc.2d 251, 415 N.Y.S.2d 939 (1979). . . . 30

Watkins v. Mercy Medical Center, 354 F. Supp. 799, aff'd 520 F.2d 894 (9th Cir. 1973). . . . 39

Wooley v. Maynard, 430 U.S. 705 (1977). 17

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution
Amendment I. . . . . 2, passim
Amendment XIV. . . . . 2, passim

20 U.S.C. §1681 et seq 26
28 U.S.C. §1257(3) 1

29 U.S.C. §169 . . . . . 17, 34

42 U.S.C. § 300a-7 . . . . 33, 35, 37, 39
42 U.S.C. § 300a-7[a] and [b]. 37
42 U.S.C. § 300a-7[d,e]. . .3, 9, 17, 26, . 35, 37, 42
42 U.S.C. §1983. 2
42 U.S.C. § 2000e, et. seq. 23
42 U.S.C. § 2000e(j) 34
42 U.S.C. § 2000e(k) 17, 41

Pregnancy Disability Act of 1979, P.L. 95-598, Title III § 330, 92 Stat. 2679 40

Page

MISCELLANEOUS AUTHORITIES

E.E.O.C. Religious Discrimination Guidelines, 29 C.F.R. §1605.1 . . . 34

House Rept. No. 95-948, "Civil Rights Act of 1964 -- Pregnancy Discrimination," 78-2 U.S. Code Cong. & Admin. News 4749, at 4755 42

OPINIONS BELOW

The oral opinion of the Superior Court for San Diego County is unreported and appears at Appendix 34a to 46a. The opinions of the California Court of Appeals for the Fourth Appellate District, Division One, have been reported at 137 Cal App. 3d 389 (1982), 187 Cal. Rptr. 164 (1982) (on rehearing) and 136 Cal. App.3d 1, 185 Cal. Rptr. 791 (1982) and appear at Appendix 1a and 20a.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The order of the Supreme Court of California denying review of the judgment of the California Court of Appeal was entered on January 27, 1983. This petition was filed within the 90-day period following the denial of the petition for hearing in the California Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. Sections 300a-7[c,d]

[c] (d) Individual rights respecting certain requirements contrary to religious beliefs or moral convictions. No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health, Education and Welfare, if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

[d] (e) No entity which receives, after the date of enactment of this paragraph, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act, the Community Mental Health Centers Act ... may deny admission or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness,

> to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions."

STATEMENT OF THE CASE

This case comes to the Court from a decision of the California Court of Appeals affirming summary judgment against petitioners on several issues of federal law. Although there was controversy over several issues of material fact, the California courts held, as a matter of federal law, that petitioners could not prove any set of facts which would sustain their First Amendment claims, and that federal statutory law did not extend to their claims.

On December 12, 1977, petitioners filed a complaint alleging that the University Of California's policy of requiring them to contribute to the cost

of abortions obtained by other students and to campus organizations engaged in political activity with which they do not agree, violated their rights under the First and Fourteenth Amendments to the Constitution of the United States, Article 1 Section 8 of the California Constitution and other state and federal statutes. The Superior Court of San Diego County, the Honorable Ross Tharp presiding, overruled the University's demurrer to the First Amended Complaint. (R. 987)[1] After some discovery, cross-motions for specification that certain issues were without substantial controversy and for summary judgment were filed by petitioners and the respondent Regents. Oral argument

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1. The record will be designated as R. ____. References to the transcript of hearing, April 24, 1980, are to the Appendix to this petition.

on the cross-motions was heard on April 24, 1980. Notwithstanding the existence of controversy over the material facts of whether or not the University's policy of expulsion for refusal to pay the disputed portion of the fee was a burden on petitioners religious beliefs, the Superior Court, the Honorable Franklin B. Orfield presiding, granted the University's motion for summary judgment in a short opinion from the bench. (R. 995) (34a) An appeal followed.

The Superior Court's decision rested upon facts which either did not appear in the record or which were flatly contradicted by the sworn statements submitted in support of the position petitioners took before that Court. In addition, Judge Orfield relied, in part, on an erroneous interpretation of federal law, later reversed by this Court in Harris v. McRae, 448 U.S. 297 (1980)

(42a). Thus, the appeal below raised issues of procedural fairness relating to the trial court's assumption of facts not appearing in the record, as well as constitutional and statutory issues. In its initial opinion dated September 21, 1982 (18a), the Court of Appeal addressed only the constitutional issues, holding that no set of facts will support a free exercise and nonassociation claims resting on objections to identifiable parts of mandatory student fees. A petition for rehearing was filed on the grounds that, among other things, the state court was constitutionally obligated to decide issues of federal statutory law governing the disposition of the case, and that the law of the case was inconsistent with the rules applied to cases of this type in the Ninth Circuit. (59a) The petition was granted (18a) and oral argument was

heard on November 9, 1982. The opinion after rehearing was issued on November 16, 1982 rejecting the federal statutory claims and reaffirming the prior opinion on the federal constitutional claims. (1a) A petition for hearing was filed in the California Supreme Court on December 17, 1982, raising both federal and state law issues, and was denied by that Court on January 27, 1983. (17a)

The Court of Appeal's decision rejecting the appellants' claims to constitutional and statutory protection rests upon two disputed assertions of law: first, that exclusion from the University does not "burden" or "coerce" the free exercise and associational rights of students whose religious beliefs forbid the payment of money for abortions obtained by other students or for pro-abortion political activity by other students. (Opinion of November 16,

1982 at 5-9) [8a to 11a]; and second, that Congress could not have intended that 42 U.S.C. § 300a-7[d,e] would protect students who have religiously based objections to participating in a University mandated (but student financed) program which provides payments for abortions, notwithstanding its exemption from participation "in any part" of such a program. [13a-16a]

Statement of Facts

In late 1977, petitioners Susan Erzinger, Margaret Patton, and Albin Rhomberg informed the respondent University of California [hereafter "the Regents" or "the University"] that they objected on religious grounds to being compelled to make financial contributions to the cost of other students' abortions through their mandatory student fees. The exact sums at issue in

this case are unknown at this time,[2] but all parties agree that some ascertainable portion of the registration and other fees imposed on all students are used directly to pay the cost of abortions for other students, and that refusal to pay this part of the fee will result in expulsion for non-payment of fees. Another portion of the mandatory fees involved in this case is used by campus organizations for pro-abortion political organizing and activity, and petitioners raised objections to that portion as well.[3]

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2. A trust fund was established by stipulation of the parties to hold the disputed fees until the legal and factual issues in this case could be determined. (R. 959)

3. The complaint also raised a more generalized objection to forcing all students to participate in any type of political or ideological activity to which they do not wish to contribute. This count of the (Footnote continued on next page.)

The substantive issues in this petition are the University's right, under federal statutory and constitutional law, to force unwilling students, like these appellants, to support abortion and pro-abortion political activity notwithstanding their moral and religious objections and the existence of a "check-off" procedure to accommodate students who do not wish to support certain political activities. At no time have appellants questioned the Univer-

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complaint was dismissed without prejudice in order to have the appellate court determine the appropriate rule of law to be applied in this case. (R. 957) The Court of Appeal's ruling affirms the trial court's holding that a student has no constitutional right to be free of enforced fee contributions regardless of their purpose because in its view, mandatory student fees are like taxes. (R. 995) (10a) It is this rationale which raises the conflict with the United States Court of Appeals for the Third Circuit. See Part I infra.

sity's general authority to impose fees, to provide curricular programs or to provide for abortion services for any student who wishes to use or pay for them. Likewise, petitioners have not questioned the University's policy of supporting certain political organizations with mandatory fee money derived from students who do not object to supporting them. Their only objection is coerced financial contribution to specific, non-educational or political programs for other students.

The material facts relevant to the fee claim are undisputed. Petitioners answered sworn interrogatories propounded by the University describing the details of their religious and conscientious objections to participating in the University's program of subsidizing abortion and political activity to which the appellants were religiously, moral-

ly, and ideologically opposed. Affidavits and declarations showing that the University could reasonably accommodate petitioners' religious beliefs were filed along with the interrogatory answers in support of petitioners' claims.

The University did not submit declarations or affidavits taking issue with either the religious claims, or petitioners' claim that their religious and political objections could be accommodated through an already-existing "check-off" deduction policy for students who do not wish to participate in the political activities of certain campus organizations.

The undisputed facts before the California courts established that petitioners sincerely held religious beliefs forbid them to provide supporting funds to or otherwise participate in any

aspect of a program supporting abortion. They informed the University of their objections and were told that unless all fees were paid, including the portion allocable to abortion, they were to be expelled. From the beginning, the University understood both the religious basis of the objection and the extremely limited nature of the relief sought. (R. 871-872) Susan Erzinger's answers to the University's interrogatories stated:

> Q. Do you believe that you will be faced with any other religious sanctions by the payment of student fees alleged in the Complaint?
>
> A. I cannot go against what my conscience and my God say is not right. I would not be true to my own self, true to my own conscience, if I supported the use of my money or my parents' money to pay for abortions, the killing of unborn chil-

> dren, through my mandatory student fees.
>
> Q. If your answer ... is in the affirmative, please list the type of religious sanction(s) ...
>
> A. It would be hypocrisy for me to hold the values of every man's Right to Life and then knowingly and willingly let myself be coerced into supporting the killing of innocent, unborn children with my money. This would be a sin against my own conscience. Answers to University Interrogatories 11 (l,m), Susan Byrne Erzinger, at 7. (R. 1190) See generally, e.g., R. at 999; 1058-1059; 1103-1105.

The decision of the Superior Court made it clear that the University could demand that all students, even those with objections like that quoted above, could be forced to pay for the abortions and pro-abortion political activities of their fellow students. (41a) The Court of Appeal went even farther, holding

that, as a matter of federal law, such payments do not constitute a burden on religious beliefs or other First Amendment interests. (9a-13a)

It is on these facts that this petition reaches the Court. Because it is well-settled that coerced payments do violate the First Amendment when the penalty for refusal is the loss of an otherwise available public benefit (in this case, enrollment at the University), it is petitioners' position that the state court's ruling is in conflict with a long line of federal case law which holds that financial contributions are a form of association protected by the First Amendment to the Constitution of the United States, see, e.g., Abood v. Detroit Board of Education, 431 U.S. 209 (1977), and that it is squarely in conflict with the decision of the United States Court of Appeals for the Third

Circuit in Galda v. Blaustein, 686 F.2d 159 (1982). It conflicts with decisions holding that no person should be forced to support or participate in an activity to which he or she is religiously opposed, see, e.g., Wooley v. Maynard, 430 U.S. 705 (1977); Torcaso v. Watkins, 367 U.S. 488 (1961). See also 42 U.S.C. § 300a-7[c,d]; 42 U.S.C. § 2000e(k); 29 U.S.C. § 169, and it adopts an approach rejected in this Court's holding in Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) respecting the proper standard to be applied to a case alleging a "burden" on religious belief or practice, and it is in conflict with the application of similar rules under federal civil rights statutes construed by the Ninth Circuit Court of Appeals. See, e.g., Burns v. Southern Pac.

Transp. Co., 589 F.2d 403 (9th Cir. 1979), cert den., 439 U.S. 1072 (1979).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT, AND IT IS SQUARELY IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

A. It Is Well-Settled That Objection To State-Coerced Payment of Money for Causes and Activities Opposed on Religious or Political Grounds by the Person Forced to Make the Payment States a First Amendment Claim.

The California Court of Appeal's decision holds that coerced payment of money for causes and activities opposed on religious or political grounds does not raise First Amendment questions, and that a state university may expel any student who refuses, for religious reasons, to pay for the abortions or pro-

abortion political activities of other students. (9a-12a)

Given the consistent holdings of this Court in Abood v. Detroit Board of Education, 431 U.S. 209 (1977) and its progeny in the Ninth Circuit and elsewhere, see, e.g., Burns v. Southern Pacific Transp. Co., 589 F.2d 403, 405 (9th Cir. 1979), cert. den. 439 U.S. 1072 (1979); Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981); Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982), (state university has First Amendment duty to accommodate refusal to pay student fees used for ideological purposes), the Court of Appeal's conclusion that no coercion exists because the compelled association is financial is squarely in conflict with the decision of the United States Court of Appeals for the Third Circuit in Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982),

rev'g and remanding for trial, 516 F. Supp. 1142 (D.N.J. 1981).

One of the first major statements made by this Court on the issue presented in this case came in Buckley v. Valeo, 424 U.S. 1, 16 (1976) (per curiam) in which it was held that: "[s]ome forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involved a combination of the two." Restrictions imposed by the government on the expenditure of money for political purposes "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. In the case at bar, the basic issue is whether the University of California, an agency of the state, may use its mandatory fees to force all stu-

dents, including those having religious objections, to contribute to a subsidy program for abortion and pro-abortion politics simply because its health service administrators and others feel that is is for the "common good or part of a "full service" medical program. It is undisputed that a portion of the mandatory student fees support abortions and campus groups which have taken political positions favoring abortion. (R. 1802-1803; 1342-1344) There has never been a showing that the mandatory contributions of these petitioners is necessary to the continued existence of either activity, see United States v. Lee, 102 S.Ct. 1051 (1982), and it is undisputed that the University utilizes a "check-off" program similar (but not identical to) that approved in Galda v. Bloustein, 516 F.

Supp. 1142 (D.N.J. 1981)[4] to accommodate certain political objections to the amount billed.

From the outset of this case, appellants have made it plain to the University that they disagree with the views and activities supported by the part of their fees which is used to support abortion and pro-abortion political activity, and that they are forbidden to participate in such programs, financially or otherwise, by the tenets of their religion. Likewise, the University has made it clear that appellants will be

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4. Galda was reversed and remanded by the Third Circuit on the grounds that the check-off, as administered by Rutgers, "offends the principles enunciated in Abood, and that, at least for summary judgment purposes, the refundability scheme does not suffice to remedy the constitutional defect ...." Galda v. Bloustein, 686 F.2d 159, 163 (3rd Cir. 1982), rev'g in part 516 F. Supp. 1142 (D.N.J. 1981)

disenrolled from the University should they attempt to withhold from their fee payments the portion of the fee which supports the abortion subsidy program and pro-abortion political activity.

Thus, the issue is joined on the question of whether coercing payments from a dissenting student, to be used by the state university to support the private social or political aims of other students which are religiously abhorrent to dissenter, can result in a violation of the constitutional rights of dissenter. This Court first addressed the issue in the context of public employment in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), and its rationale is applicable here.

> The fact that appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional

> rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the state.... [These principles] thus prohibit appellants from requiring any of the appellants to contribute to the support of an ideological course he may oppose as a condition of holding a job as a public school teacher. Abood, supra, 431 U.S. at 234-235.

Even in the face of such an unequivocal statement by the Court, the Superior Court held that the disputed fees in this case did nothing more than force these appellants to "participat[e] with a large group of students in becoming involved in the things that are important for young people to become involved in ..." at the University. (A at 32). Petitioners' religious convictions, however, do not permit them to participate in any manner in abortions,

including financing them for others. The Court of Appeal refused even to find coercion, even though the dissenting student will be disenrolled from the University for refusal to pay the part of the fee allocable to non-educational and political activities to which they are religiously opposed. (8a-12a)

There is no dispute in this case that the students raise bona fide, sincerely-held religious objections to mandatory financial participation in a program which subsidizes abortions and pro-abortion political activity. While the Court of Appeal held that, as a matter of federal law, no one's religious beliefs regarding abortion can validly extend beyond objections to being forced to submit to abortions, join proabortion groups, or refrain from expressing their views on abortion, (8a-9a) it is undisputed on the record below that these

petitioners' beliefs actually do extend to financial participation in abortion as well.

The University has consistently hidden behind its conceded power to levy fees on students in an attempt to avoid the fundamental question raised here. The Superior Court, without the benefit of a record to support it, held that abortions are important to other students and concluded, over religious objections by petitioners, that it was also "important" that they participate in a program which support them. (a32) It drew support for this holding from the federal district court decision later reversed by this Court in Harris v. McRae, 448 U.S. 297 (1980), rev'g, 491 F. Supp. 630 (E.D.N.Y. 1980) (40a), and from Title IX, 20 U.S.C. §§ 1681 et seq, while ignoring federal law directly on point. See 42 U.S.C. § 300a-7 [c, d]

(42-43a) The Court of Appeal expressly refused to hold that disenrollment under these circumstances could raise a First Amendment or statutory question because, in its view, mandatory student fees were analagous to taxes, (10-11a) a view totally inconsistent with the approach taken by other courts, state and federal, which have addressed the issue. See, e.g., Galda v. Bloustein, supra; Good v. Assoc. Students of the Univ. of Washington, 86 Wash.2d 94, 542 P.2d 762 (1975) (allegations regarding fees must be proved by specific evidence at trial).

This was precisely the attitude condemned by the Supreme Court, in Abood and subsequent cases. Abood, supra, 431 U.S. at 234 n.31.

> "Our government has no more power to compel individuals to support union programs or union publications than it has to compel the sup-

> port of political programs, employer programs, or church programs. And the First Amendment, fairly construed, deprives the government of all power to make any person to pay out one single penny against his will ..." International Assn. of Machinists v. Street, 367 U.S. 740, 791 (1961) (Black, J., dissenting).

See generally, Virginia State Bd. of Pharmacists v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Beck v. Communications Workers of America, 468 F. Supp. 87 89 (D. Md. 1979) ("spending fees exacted ... in support of ideological activities to which plaintiffs object, ... would, of course, seriously implicate the plaintiffs' fundamental first amendment interests"). Cf., New Left Educational Project v. Bd. of Regents of the University of Texas System, 326 F. Supp. 158, 163 (W.D. Tex., 1970); Let's Help Florida v. Smathers, 453 F. Supp. 1003,

1007 (N.D. Fla. 1978); Jensen v. Yonamine, 437 F. Supp. 368 (D. Hawaii 1977). The fact that the entity is a university rather than a labor union is irrelevant to the question of whether petitioners have stated a claim. Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982). The federal cases uniformly hold that it is the nature of the supported program which is crucial once the source of the coercion is found to be of the state. Defenses to the claim are matters of disputed fact to be resolved at trial, Galda, supra, 686 F.2d at 167, not on summary judgment as was done here.

Reduced to its essentials, the rationale of Abood and its progeny is that the government may not condition the receipt of an important benefit, whether it be education or employment, on the payment of dues or fees to which ideological objections are raised by

those forced to pay. See Galda v. Bloustein, supra. Gavett v. Alexander, 477 F. Supp. 1035 (D.C. 1979); Warner v. Board of Education, 99 Misc.2d 251, 415 N.Y.S. 2d 939, 945-946 (1979); Carlson v. Portland, 45 Ore. App. 439, 608 P.2d 1198. Petitioners respectfully submit that this Court should grant their petition and vacate the opinion below with instructions to reconsider the matter in light of established federal authority and the existing conflict between the decision of the Court of Appeal and that of the Third Circuit in Galda.

B. The Holding Of The California Court Of Appeal Is In Conflict With This Court's Rulings Respecting The Power Of Any Court To Second-Guess A Matter Of Religious Belief.

Although the basis of the California Court's holding on the constitutional issue is that state coerced payment of money for politically, reli-

giously or ideologically repugnant activity does not raise First Amendment claims, an alternative basis for its holding is that coerced payments for abortion do not really violate anyone's religious beliefs. (See Opinion at 7-8) (8-9a) (appearing to limit valid religious concerns to being forced to "submit to abortions, join pro-abortion groups, or refrain from expressing their views on abortion.") As this Court pointed out in Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981), it is simply not appropriate for any court to "dissect" petitioners' religious beliefs and hold that religiously based objections to coerced financial participation do not rise to the same level of repugnancy to religious belief as coerced direct physical participation.

> "We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs ...
>
> * * *
>
> Particularly in this sensitive area, it is not within the judicial competence to inquire whether petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.
>
> The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion." 450 U.S. at 715-716 (emphasis added).

It is apparent from a reading of Thomas, supra, that the appropriate standard for determination of a prima facie case alleging violation of religious freedom for statutory purposes is

essentially set forth in the formulation adopted by the United States Court of Appeals for the Ninth Circuit in Burns v. Southern Pacific Transp. Co., 589 F.2d 403 (9th Cir. 1979), cert. den., 439 U.S. 1072 (1979). Although the case arose under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, et. seq., it is similar to both the constitutional inquiry required by Thomas and the statutory inquiry required by 42 U.S.C. § 300a-7, which is discussed later in this petition. In Burns the Court held:

> Burns fully met his burden of proving a prima facie case of religious discrimination in violtion of Title VII. He proved he had a bona fide belief that ... the payment of union dues were contrary to the teachings of his church. He informed his employer and his Union about his religious views. He was thereafter threatened with discharge for his refusal to pay union dues and assessments. Anderson v. General Dynamics Convair Aerospace

> Division (9th Cir. 1978) 589 F.2d 397. Thereafter the burden was on the Company and the Union to prove that they made good faith efforts to accommodate Burns religious beliefs, that the efforts were unsuccessful, and that they were unable reasonably to accommodate those beliefs without undue hardship. (citations omitted). 589 F.2d at 404.

See 42 U.S.C. §2000e(j) (defining "religion" to include "all aspects of religious observance and practice, as well as belief ..."); 29 U.S.C. § 169 (compulsory dues payment); EEOC Religious Discrimination Guidelines, 29 C.F.R. §1605.1. Rosano v. United States Marine Corps, - Ct. Cl. (Ct. Claims slip opinion Jan. 19, 1981) (holding that the Merit Systems Protection Board must review a claim by a federal employee for refund of insurance premiums paid for abortion).

II. THE CALIFORNIA COURT OF APPEAL HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CIVIL RIGHTS LAW IN A MANNER INCONSISTENT WITH THE PLAIN LANGUAGE OF 42 U.S.C. § 300a-7 AND THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN RELATED CASES.

A. As A Recipient Of Federal Public Health Funds, The University Of California May Not Deny Admission To Any Person Because They Refuse To Participate "In Any Way" In An Abortion Subsidy Program.

1. The Construction Of 42 U.S.C. Section 300a-7[d,e] by the Court of Appeal is Clearly Erroneous

A glance at the legislative history of the "conscience clauses" which were passed after the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973) make it clear that Congress has been acutely aware of the moral dilemmas facing those who do not wish, for religious reasons, to participate in any part of a medical or educational program which includes abortion. See Harris v. McRae, 448 U.S. 297(1980). It goes

without saying that as the practice of abortion becomes more widespread, increased pressure to conform is brought to bear on those who refuse, for religious reasons, to accept the proposition that abortion is a morally defensible response to an unwanted pregnancy. This is precisely the situation at bar. The University has decided that abortions are "necessary" for some students and that all students must pay for them and for political activity urging their continued funding and legality. Petitioners believe that abortions are immoral and that they can have nothing to do with them. To them, participation in a cost-sharing program which will enable others to obtain abortions or urge their continued legal protection is just as morally repugnant as participation in the abortion procedure itself.

Congress has specifically addressed this issue on several occasions. In keeping with its concern that no person -- employee or student -- should be denied admission or enrollment in any entity or program which receives federal funds merely because one's religious views forbid participation in an abortion program, Congress enacted 42 U.S.C. § 300a-7. It provides a comprehensive system of protections for all those likely to encounter pressure under federally funded programs to conform their views on abortion to those of the administrators of the program. Sections 300a-7[a] and [b] provide comprehensive protection to institutions and medical personnel who do not wish to participate. Sections 300a-7[c] and [d], which apply to this case, extend those protections to any individual whose religious views on abortion conflict with the

desires of program administrators.

Those sections provide:

> [c] (d) Individual rights respecting certain requirements contrary to religious beliefs or moral convictions. No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health, Education and Welfare, if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions. (emphasis added).
>
> [d] (e) No entity which receives, after the date of enactment of this paragraph, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act, the Community Mental Health Centers Act ... may deny admission or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel,

> suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions." (emphasis added).

It is undisputed that the University of California receives millions of dollars in grants under the Public Health Service Act[5] and is subject to the provisions of Section 300a-7, but the California Court of Appeal construed the statute so narrowly that it no longer has the broad meaning Congress and the federal courts of the Ninth Circuit have given it. See Watkins v. Mercy Medical Center, 364 F. Supp. 799, aff'd 520 F.2d 894 (9th Cir. 1973).

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5. The University has conceded its receipt of federal funds. The Courts below were asked to take judicial notice that the official funding level under PHS grants for FY1931 exceeded $244 million.

The key inquiry under the statute is not whether the participation is direct or indirect as the Court of Appeals held (14-15a), but whether participation "in any way" or "in any part of" is "contrary to or consistent with the applicant's religious beliefs or moral convictions." The University has never denied that petitioners' sincerely-held religious beliefs forbid them to pay for abortions had by others. The Court of Appeals was, therefore, precluded by the statute itself from ignoring those beliefs.

That Congress has addressed the issue of coerced payment for abortions directly and resolved it in favor of religious dissenters is not open to serious question. During the debate over the Pregnancy Disability Act of 1979, P.L. 95-598, Title III §330, 92 Stat. 2679, Congress addressed the question of

whether an employer might be guilty of sex discrimination if, on religious grounds, he or she refused to pay for abortions via insurance or otherwise. The result was 42 U.S.C. § 20000e(k), as amended, which provides:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis or pregnancy, childbirth, or related medical conditions; .... This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion." 42 U.S.C. § 2000e(k)

This section was added in committee because many members of Congress "were troubled ... by any implication that an employer would have to pay for abortions not necessary to preserve the life of the mother through medical benefits or

other fringe benefit programs, even if that employer ... harbored religious or moral objections to abortion; such a requirement, it was felt, could compromise the religious freedom of such employers." House Rept. No. 95-948, "Civil Rights Act of 1964 -- Pregnancy Discrimination," 78-2 U.S. Code Cong. & Admin. News 4749, at 4755 (emphasis added). Where, as here, it is a student religious dissenter, not an employer, which must bear the cost of the University's abortion subsidy program, the Congressional mandate that their religious beliefs be accommodated is the same. 42 U.S.C. § 300a-7[c,d].

For the Court of Appeal to read the statute so restrictively in the face of clearly expressed Congressional concern that individuals not be faced with legal disabilities or loss of governmental benefits such as education because

they refuse to pay for abortions or pro-abortion political activity for others is astounding. The only conceivable reason for so doing is a sub rosa judgment that being forced to pay for abortions is not nearly as morally repugnant to the believer as being forced to actually particpate in the procedure itself. (App. 13-15a) Under Thomas v. Review Board, supra, however, such decisions by courts are unconstitutional. They are certainly inconsistent with the clear holdings of the United States Courts of Appeal, including the Ninth Circuit, respecting the scope to be given to the term "religion" under the Civil Rights laws, see Cooper v. General Dynamics, 533 F.2d 163, cert. denied, 433 U.S. 908 (1977) (Title VII) ("all forms and aspects of religion, however eccentric, are protected ..."); Burns v. Southern Pac. Transp. Co., 589

F.2d 403 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979) (religiously based refusal to pay union dues); Tooley v. Martin-Marietta, 476 F. Supp. 1027, aff'd 648 F.2d 1239 (9th Cir. 1981); Rosano v. United States Marine Corps., supra.; Haring v. Blumenthal, 471 F. Supp. 1172 (D.D.C. 1979) (coerced indirect participation in abortion related federal employment states a claim under Title VII), and ignore the scope given such statutes by the agencies charged with enforcing them. See EEOC Religious Discrimination Guidelines, 29 C.F.R. §1605.1.

CONCLUSION

Petitioners have demonstrated that the decision of the California Court of Appeal granting summary judgment against them in favor of the Respondent Regents is inconsistent with federal statutory law, in conflict with federal case law

governing the Ninth Circuit, and directly in conflict with the decision of the United States Court of Appeals for the Third Circuit in Galda v. Bloustein, supra. For all these reasons, Petitioners respectfully submit that the petition should be granted and that the decision below should be vacated and remanded to the Court of Appeal for reconsideration in light of federal standards. In the alternative, Petitioners urge, first, that the petition should be granted and the decision below affirming a grant of summary judgment for the University be summarily reversed, or second, that the petition should be granted and the matter scheduled for full consideration by the Court.

Respectfully submitted,

signed: ROBERT A. DESTRO
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CERTIFICATION OF SERVICE

Two copies of the foregoing petition for a writ of certiorari to the California Court of Appeal for the Fourth Appellate District, Division One (with appendix), were mailed to counsel for respondents this 26th day of April, 1983 addressed as follows:

Lawrence B. Garcia, Esq.
Office of the General Counsel
500 University Hall
Berkeley, California 94720

signed: ROBERT A. DESTRO

Robert A. Destro

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

SUSAN B. ERZINGER, et al., Plaintiffs and Appellants, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants and Respondents.	COURT OF APPEAL- FOURTH DIST. FILED NOV 16 1982 KEENAN G. CASADY, Clerk /s/ WPasek Deputy Clerk 4 Civ. No. 24408 (Super. Ct. No. 408559)

APPEAL from a judgment of the Superior Court of San Diego County. Franklin B. Orfield, Judge. Affirmed.

Robert A. Destro and Burton Shamsky for Plaintiffs and Appellants.

Donald L. Reidhaar, Gary Morrison, Lawrence B. Garcia and Karla J. Knieps for Defendants and Respondents.

Phyllis Alden Truby, Wendy A. Woldt and Hilary Huebsch Cohen for

Amicus Curiae Women Lawyer's Association of Los Angeles in support of respondents Regents.

Molley E. Arnold, Jennifer Tachera, Susan Bertken, Kathleen Yates and Judith A. Harper for Amicus Curiae Women Lawyers of Sacramento in support of respondent Regents.

Plaintiffs Susan Erzinger, et al., appeal a judgment favoring the Regents of the University of California on the plaintiffs' third amended complaint.

The plaintiffs' third amended complaint alleges: Plaintiffs are students at the University; the University collects a registration fee from all students; the registration fee is used to provide health services to students at facilities on and off campus; such health services include abortion counseling, abortion referral and abortion; plaintiffs have refused to pay the por-

tion of their registration fees used to pay for abortion counseling, abortion referral and abortion; plaintiffs have offered to pay all of the required fees except such amounts paid for abortion counseling, abortion referral and abortions; the University has not accepted partial payments of the required registration fees; the University has violated plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution and Article I, section 4, and Article IX, section 9 of the California Constitution by cancelling plaintiffs' enrollments at the University; the University's collecting from plaintiffs fees used to pay for abortions would force plaintiffs to violate their religious beliefs as a condition for attending the University. The plaintiffs asked the superior court to declare unconstitutional the Univer-

sity's policy requiring all students to pay compulsory registration fees and alloting a portion of such fees to pay for abortions without a pro rata exception or exemption for plaintiffs. The plaintiffs also asked the court to enjoin the University from implementing such policy and discriminating against plaintiffs and others sharing their beliefs about abortion and abortion-related services.

Pending litigation the University permitted plaintiffs to deposit the disputed fees into a trust fund.

The University asked the court to specify as without substantial controversy:

(1) the University's using mandatory student fees to provide student health services including abortion services and pregnancy counseling does not

infringe plaintiffs' rights to free exercise of religion; and

(2) the University's Regents have legal authority to assess mandatory student fees and use such fees to benefit the student population even when such fees are not used directly to support the cost of specific educational programs or services.

The plaintiffs opposed the University's motion and filed their own motion for summary judgment, asserting as a matter of law they were entitled to judgment on all issues in their third amended complaint.

After hearing, the court denied plaintiffs' motion for summary judgment and granted the University's motion to specify issues as without substantial controversy. The court said:

> "In order for an individual to show that he has been prohibited from the free

exercise of his religion, he must demonstrate that he has been coerced in his religious beliefs or that the government has unreasonably interfered with his practice of religion. In this case I see no coercion. The individuals who are students at the University of California are not required to submit to abortions. They are not required to, themselves, advocate abortions. They are not required, themselves, to advocate birth control.... Medical care is provided to students in the universities to enable the student to be a free as possible to devote themselves to their studies so that they will not have to worry about problems in connection with their health.... Merely because a student is required to pay "X" number of dollars at the beginning of each semester or each quarter does not mean that that student is endorsing abortions.... I know of no authority for the proposition that refusal to pay government taxes or fees is an activity protected by the First Amendment and no case has been cited to that effect.... [The Regents] possess viturally exclusive power with regard to the

> internal regulation of the universities, and certainly this broad discretion extends to their ability and the right to be able to set mandatory student fees.... The health services that have been afforded to students of the University of California are really nondiscriminatory and they are religiously neutral and they are consistent with the educationally related objectives."

After plaintiffs voluntarily dismissed other causes of action, the court entered judgment for the University on plaintiffs' third amended complaint.

Plaintiffs contend the court erred in finding the University's using mandatory student fees to provide student health services including abortion services and pregnancy-related counseling does not infringe their rights to free exercise of religion; they assert that they should be exempt from paying the proportion of such fees the University

uses to provide services they deem objectionable on religious grounds. However, to prevail on their First Amendment claim, the plaintiffs must allege and prove the University coerced their religious beliefs or unreasonably interfered with their practice of religion (School District of Abington Township, Pennsylvania v. Schempp (1963) 374 U.S. 203, 222-223; Cantwell v. Connecticut (1940) 310 U.S. 296, 303-304). Plaintiffs do not show the University's collecting mandatory student fees and using portions of such fees to provide services they deem objectionable in any way coerced their religious beliefs. Plaintiffs do not allege or show the University's collecting and using the fees coerced them from holding or expressing their views against abortion. They do not allege or show the University coerced them to

advocate a position on abortion contrary to their religious views. They do not allege or show the University forced them to join any pro-abortion organization. They do not allege or show the University forced them to use the student health service programs, receive pregnancy counseling, have abortions, perform abortions or endorse abortions. Plaintiffs make no showing the University denied them enrollment because of their religious beliefs opposing abortion; instead, the University cancelled their enrollment because they did not pay mandatory student fees. Further, plaintiffs do not show the University's collecting mandatory student fees and using portions of such to provide services plaintiffs deem objectionable violates their First Amendment right to practice their religion.

Plaintiffs' answers to the University's

interrogatories assert their religious beliefs require them not to pay those portions of student fees the University uses to provide abortion-related services; they allege in their third amended complaint the University should exempt them from paying such portions of the fees. However, the right to free exercise of religion does not justify refusal to pay taxes: "nothing in the Constitution prohibits the Congress from levying a tax upon all persons, regardless of religion, for support of the general government. The fact that some persons may object, on religious grounds, to some of the things that the government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax." (Autenrieth v. Cullen (1969) 418 F.2d 586, 588, cert. den. 397 U.S. 1036.) Similarly, the First Amendment does not

prohibit the University from requiring all students, regardless of religion, to pay fees for general student support services; the fact plaintiffs may object on religious grounds to some of the services the University provides is not a basis upon which plaintiffs can claim a constitutional right not to pay a part of the fees.

Under Article IX, section 9(a) of the California Constitution, the Regents have full powers to organize and govern the University. Plaintiffs concede the University has power to assess mandatory student fees generally as a condition of enrollment but assert they should not pay the portion of such fees representing the portion of the University's services they deem objectionable. However, under Article IX, section 9(f) of the California Constitution, the Regents are "vested with the legal title and the

management and disposition" of University property. Once a University collects mandatory student fees, such funds become University property. The Regents, not plaintiffs, have exclusive authority to decide how to spend University funds; allowing plaintiffs to withhold portions of mandatory student fees would effectively impair such authority. In asking the superior court to specify issues as without substantial controversy, the University submitted declarations asserting providing comprehensive student health services is a proper University function serving the education-related purpose of minimizing the detrimental effects of students' health conditions in their academic performance. Plaintiffs offered no evidence to the contrary. Given such evidence, the superior court properly found "as a matter of law the Regents have the legal

authority to assess mandatory student fees and utilize those fees for the benefit of its student population, even when those fees are not used directly to support the cost of specific education programs or services." In light of this finding, the allegations of the third amended complaint and plaintiffs' interrogatory answers, the superior court properly found the University's "use of mandatory student fees to provide student health services, which include abortion services and pregnancy-related counseling, does not infringe plaintiffs' free exercise of religious rights protected under the First Amendment to the United States Constitution."

Plaintiffs contend the judgment should be reversed because the University violated 42 U.S.C. section

300a-7(d).[1] While this statute did not exist when the complaint was filed, it would apply to discrimination occurring after its effective date, September 29, 1979. The statute was raised in plaintiffs' superior court brief and pursued here. We shall consider the issue.

The statute was intended to protect persons opposing abortion on reli-

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[1] 42 U.S.C. section 300a-7(d) reads:

"No entity which receives, after September 29, 1979, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act, the Community Mental Health Centers Act or the Developmental Disabilities Assistance and Bill of Rights Act may deny admission or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions."

gious or moral grounds. However, the statute is limited in scope.

The statute prohibits denying admission or discriminating against any applicant for study because of the applicant's reluctance to "assist or in any way participate in the performance of abortions or sterilizations." The crucial words are "performance of abortions or sterilizations." The proscription applies only when the applicant must participate in acts related to the actual performance of abortions or sterilizations. Indirect or remote connections with abortions or sterilizations are not within the terms of the statute. We believe Congress did not intend to prevent the University from requiring its students to participate in a comprehensive health insurance program which includes cost benefits for persons desiring abortions or sterilizations. A

health program containing benefits for procedures which others might choose does not mean the applicant is involved in the "performance" of those procedures.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/ Brown
BROWN, P.J.

WE CONCUR:

/s/ Cologne
COLOGNE, J.

/s/ Staniforth, J.
STANIFORTH, J.

Notice of Entry of Order
Denying A Hearing
January 27, 1983
California Supreme Court

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

Jan. 27, 1983

I have this day filed Order Hearing Denied

In re: 4 Civ. No. 24408

ERIZINGER, ET AL

vs

REGENTS OF U.C.

Respectfully,
Clerk

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT
DIVISION ONE

SUSAN B. ERZINGER, et al., Plaintiffs & Appellants, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants & Respondents.	COURT OF APPEAL- FOURTH DIST. FILED OCT 8 1982 KEENAN G. CASADY, Clerk 4 Civ. No. 24408 /s/ G Ondler Deputy Clerk Superior Court No. 408559

BY THE COURT:

A rehearing is granted, solely because there is some basis to appellants' request to orally argue the matter.

The matter is set for hearing at 6010 State Building, San Diego, California, 92101, on November 8, 1982, at 9:00 a.m.

/s/ Brown
Presiding Judge

Copies to: Burton Shamsky, Esq.

Robert A. Destro, Esq.
Wash. D.C.
Ms. Gilary Huebsch Cohen
Donald L. Reidhaar, et al.,
Berkeley, CA
Superior Court/ SD
Catholic League for
Religious & Civil Rights

Opinion of September 21, 1982
California Court of Appeal,
Fourth Appellate District, Division One

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE
STATE OF CALIFORNIA

SUSAN B. ERZINGER, et al.,	)	COURT OF APPEAL-FOURTH DIST. FILED SEP 21 1982 KEENAN G. CASADY, Clerk /s/ WPasek Deputy Clerk
Plaintiffs and Appellants,	)	
v.	)	
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Plaintiffs contend the court erred in finding the University's using mandatory student fees to provide student health services including abortion services and pregnancy-related counseling does not infringe their rights to free exercise of religion; they assert that they should be exempt from paying the

proportion of such fees the University uses to provide services they deem objectionable on religious grounds. However, to prevail on their First Amendment claim, the plaintiffs must allege and prove the University coerced their religious beliefs or unreasonably interfered with their practice of religion (School District of Abington Township, Pennsylvania v. Schempp (1963) 374 U.S. 203, 222-223; Cantwell v. Connecticut (1940) 310 U.S. 296, 303-304). Plaintiffs do not show the University's collecting mandatory student fees and using portions of such fees to provide services they deem objectionable in any way coerced their religious beliefs. Plaintiffs do not allege or show the University's collecting and using the fees coerced them from holding or expressing their views against abortion. They do not allege or

show the University coerced them to advocate a position on abortion contrary to their religious views. They do not allege or show the University forced them to join any pro-abortion organization. They do not allege or show the University forced them to use the student health service programs, receive pregnancy counseling, have abortions, perform abortions or endorse abortions. Plaintiffs make no showing the University denied them enrollment because of their religious beliefs opposing abortion; instead, the University cancelled their enrollment because they did not pay mandatory student fees. Further, plaintiffs do not show the University's collecting mandatory student fees and using portions of such to provide services plaintiffs deem objectionable violates their First Amendment right to practice their religion. Plaintiffs'

answers to the University's interrogatories assert their religious beliefs require them not to pay those portions of student fees the University uses to provide abortion-related services; they allege in their third amended complaint the University should exempt them from paying such portions of the fees. However, the right to free exercise of religion does not justify refusal to pay taxes: "nothing in the Constitution prohibits the Congress from levying a tax upon all persons, regardless of religion, for support of the general government. The fact that some persons may object, on religious grounds, to some of the things that the government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax." (Autenrieth v. Cullen (1969) 418 F.2d 586, 588, cert. den. 397 U.S. 1036.) Similarly, the

First Amendment does not prohibit the University from requiring all students, regardless of religion, to pay fees for general student support services; the fact plaintiffs may object on religious grounds to some of the services the University provides is not a basis upon which plaintiffs can claim a constitutional right not to pay a part of the fees.

Under Article IX, section 9(a) of the California Constitution, the Regents have full powers to organize and govern the University. Plaintiffs concede the University has power to assess mandatory student fees generally as a condition of enrollment but assert they should not pay the portion of such fees representing the portion of the University's services they deem objectionable. However, under Article IX, section 9(f) of the California Constitution, the Regents are

"vested with the legal title and the management and disposition" of University property. Once a University collects mandatory student fees, such funds become University property. The Regents, not plaintiffs, have exclusive authority to decide how to spend University funds; allowing plaintiffs to withhold portions of mandatory student fees would effectively impair such authority. In asking the superior court to specify issues as without substantial controversy, the University submitted declarations asserting providing comprehensive student health services is a proper University function serving the education-related purpose of minimizing the detrimental effects of students' health conditions in their academic performance. Plaintiffs offered no evidence to the contrary. Given such evidence, the superior court properly found

"as a matter of law the Regents have the legal authority to assess mandatory student fees and utilize those fees for the benefit of its student population, even when those fees are not used directly to support the cost of specific education programs or services." In light of this finding, the allegations of the third amended complaint and plaintiffs' interrogatory answers, the superior court properly found the University's "use of mandatory student fees to provide student health services, which include abortion services and pregnancy-related counseling, does not infringe plaintiffs' free exercise of religious rights protected under the First Amendment to the United States Constitution."

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/ Brown
BROWN, P.J.

WE CONCUR:

/s/ Cologne
COLOGNE, J.

/s/ Staniforth, J.
STANIFORTH, J.

Oral Opinion of April 24, 1980
Superior Couirt for San Diego County

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

DEPARTMENT 24
HON. FRANKLIN B. ORFIELD, JUDGE

SUSAN B. ERZINGER, et. al., Plaintiffs, vs. REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants.	)	NO. 458599 MOTIONS AND RULINGS OF THE COURT

REPORTER'S TRANSCRIPT

[pages 58-66]

APPEARANCES: [deleted]

The Court: First of all, I might mention, and I am sure it's been really tacitly acknowledged by everyone, that the sincerity of the plaintiffs is really not an issue in this case.

I am certain that the plaintiffs are sincere in their feelings relative to the question of abortion; and regard-

less of how you might feel about the subject of abortion or how I might feel about the subject of abortion, I feel that that is not the central, really the central issue in this case.

In order for an individual to show that he has been prohibited from the free exercise of of his religion, he must demonstrate that he has been coerced in his religious beliefs or that the Government has unreasonably interfered with is practice of religion.

In this case I see no coercion.

The individuals who are students at the University of California, are not required to submit to abortions.

They are not required to, themselves, advocate abortions.

They are not required to, themselves, advocate birth control.

A university is a unique organization. It's different from a labor organization.

For instance, there was a case recently cited in our district relative to the interpretation of one of our federal judges in connection with the activities of a union.

A union's activities are extremely narrow as compared to the activities of a university.

Relative to a university, it's not merely studies to educate a person to the professions or to prepare them for later life; but there are certain things that people in the universities are taught by way of exposure to individual concepts, ideas that can come to them in no other way; and these things are given to university students.

They permit certain funds that are given by students or paid by students to

broaden the students from an intellectual, political, ethical standpoint.

It's an entirely different type of organization than just about any organization you can imagine.

As I have indicated, it provides a broad general background in things other than the academic life.

Students, of course, are entitled to express their views and forms are provided at these institutions for that purpose.

Facilities and programs are provided to enlarge and expand life generally for the students, as I have indicated, politically and otherwise.

In the labor union case that was cited, I think that it was demonstrated in that case that the interests of the labor union are extermely narrow. They have one thing in mind and that is to further the interests of the labor

worker and they have no interest in many of the things that they expended money for, and the court required the money to be repaid for those reasons.

Medical care is provided to students in the universities to enable the student to be as free as possible to devote themselves to their studies so that they will not have to worry about problems in connection with their health, the financial difficulties in connection with their health.

When a young woman in one of the universities becomes pregnant, she has one of two courses
she can take.

She can decide that she will go the full term and have the child or she can decide that she will terminate her pregnancy. And each and every student, woman student, in the university has the

right to make that decision uninfluenced by anybody.

The medical services that are provided are provided generally.

It's not just a matter of providing medical services for maternity care or for termination of pregnancies, but it is a broad spectrum of medical facilities and rights that are made available to the students, and this is just one facet of these medical rights.

There is nothing that prohibits any of the students from making a free and unfettered choice as to what they wish to do if they find themselves in a position of being pregnant.

Mandatory dues do not constitute an endorsement of the views of the institution or anyone in the institution.

Merely because a student is required to pay "X" number of dollars at the beginning of each semester or each

quarter does not mean that that student is endorsing abortions or that he is endorsing the great number of people who are against abortions.

All that that student is doing is participating with a large group of students in becoming involved in the things that are important for young people to become involved in when they metriculate [sic] in a university.

The cases of the mandatory flag salute and the instances of a license plate which would indicate freedom or death or words to that effect are entirely different from this case in that under those circumstances the individual involved is specifically required to commit an act or do a thing which might be repugnant to his religious beliefs.

Nobody is required to do anything under the present circumstances, under

the present circumstances of the present case. [sic]

Freedom from religion or freedom from religious activity does not include the right to be free from all governmental regulation but is limited to practice, to the practice of one's religion without unreasonable governmental interference, and a measure of that governmental interference is to ask yourself, "Does it threaten the very survival of the religious tenets of that particular person?"

I can see nothing in the conduct of the University of California, of the Regents, which, in any way, affects, really affects or threatens the survival of the religious convictions of the young people who are in attendence.

I know of no authority for the proposition that refusal to pay government taxes or fees is an activity pro-

tected by the First Amendment and no case has been cited to that effect.

A recent case that has come down, although it doesn't shed a great deal of light, it does indicate something.

It's the case of McRae vs. The Secretary of Health, Education and Welfare, and it was a case where a judge struck down the Hyde Amendment to the Medicaid Program.

The Hyde Amendment would restrict the public financing of abortions.

It was determined by the court that the amendment violated the pregnant woman's liberty, protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment.

Although this is not controlling, it is a factor that, of course, should be taken into account.

The exclusion of medical care in connection with terminations of pregnancies might very well and probably would violate Federal Law Title 9 of the 1972 Higher Education Amendments to the Civil Rights Act of 1964.

As I have indicated, that, of course, is not controlling, but certainly it would eliminate a very substantial amount of money being paid to the coffers of the State of California.

Article 9 and section 9 of the California Constitution, I believe, gives the Regents of the State of California the full right to assess mandatory fees as a condition of admission to any of the schools in the State of California.

The Regents have been characterized as a branch of the State itself, and it has been stated that they possess virtually exclusive power with regard to

the internal regulation of the universities, and certainly this broad discretion extends to their ability and their right to be able to set mandatory student fees.

Such setting of mandatory fees has been uniformly held in our sister states.

One Washington case stated, "If we allow dissenters to withhold the minimal financial contributions required, we would permit a possible minority view to destroy or cripple a valuable learning adjunct of university life."

I think in the present circumstances that the health services that have been afforded to students of the University of California are really nondiscriminatory and they are religiously neutral and they are consistent with the educationally related objectives.

Now, as I have indicated, this decision is made not as concerns neces-

sarily my feeling or your feeling in connection with the question of abortion, but it appears to me that this is the only legally tenable approach that can be made.

Under these circumstances, the motion of the Regents of the University of California to limit the issues is granted, and it is determined that as a matter of law the defendant Regents is entitled to judgment on the issue that its use of mandatory student fees to provide student health services, which include abortion services and pregnancy-related counseling, does not infringe plaintiffs' free exercise of religious rights protected under the First Amendment ot [sic] the United States Constitution.

Further, that as a matter of law the Regents have the legal authority to assess mandatory student fees and uti-

lize those fees for the benefit of its student population, even when those fees are not used directly to support the cost of specific educational programs or services.

I don't know whether I have the authority to grant the motion of the Regents relative to the last remaining issue since it wasn't a part of the motion in this case, but I think that it would necessarily follow in the event that such a motion were made.

I'll ask that counsel for the Regents prepare the necessary documents in connection with these matters, and we will be in recess.

Excerpts from Record Showing Assertion of Federal Claims

Petition to Court of Appeal for Rehearing

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

SUSAN B. ERZINGER, et al.,	)	
Plaintiffs and Appellants,	)	
v.	)	
REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,	)	4 Civ. No. 24408 (Super. Ct. No. 408559)
Defendants and Respondents.	)	

PETITION FOR REHEARING

Pursuant to Rule 27(b) of the California Rules of Court, Appellants respectfully move this Court for a rehearing. In support of their motion Appellants submit that:

1. As a matter of law, they are entitled to a trial respecting the disputed issue of coer-

cion/infringement of religious beliefs;

2. As a matter of law, the Court has erred in its holding that a student may be disenrolled from a state university receiving federal funds for refusal to participate financially in an abortion subsidy program where such payments are forbedden [sic] by the student's religious beliefs;

3. As a matter of law and fact, the Court has erred by its failure to take into account controlling federal legislation; and

4. As a matter of law and fact, the Court has erred in its conclusion that mandatory student fees of the sort challenged here are the functional equivalent of taxes.

For the reasons set forth in the attached memorandum of points and authorities and declaration of counsel, which are hereby incorporated by reference, appellants respectfully submit that they should be granted a rehearing with oral argument.

Respectfully submitted,

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DECLARATION OF ROBERT A. DESTRO
IN SUPPORT OF PETITION FOR REHEARING

I, Robert A. Destro, one of the attorneys for appellants in this case, do hereby declare under penalty of perjury that:

1.) I was primarily responsible for the writing and filing of submissions to the Court, including briefs and other written submissions;

2.) I did not receive the clerk's notice to file a request for oral argument until Friday, September 10, 1982, one day later than the date specified for filing a request for oral argument;

3.) Immediately upon receipt of the notice from the clerk's office (approximately 5:30 P.M. Friday, September 10, 1982 (E.D.T.)) I telephoned the clerk's office and indicated that I had not received the notice until it was too late to file the request.

4.) I was told by one of the assistants in the clerk's office that a note would be placed with the file indicating our desire to make oral argument and that the case would not be submitted without argument as long as I promptly sent a written request for argument to the Clerk. Because of a prior commitment already scheduled for Monday, September 13, I specifically asked whether or not mailing late Tuesday afternoon, September 14

would suffice. I was told "just mail it as soon as you can."

5.) The request for oral argument was dictated and partially typed by the close of business on September 15, 1982. It was mailed before 10:30 A.M. (E.D.T.), in plenty of time for the morning mail.

6.) I believe that the failure of the good faith attempt by both counsel and the clerk's office to remedy an inability to comply with the clerk's request because of a failure of the U.S. Mail to deliver a notice within a reasonable time from the date it was sent should not deprive these appellants of an adequate opportunity to argue their case before the court, and to answer any questions the court

might have concerning the nature of appellants religious beliefs and the substance of their constitutional and statutory claims.

Dated: Thursday, September 30, 1982
Washington, D.C.

/s/ Robert A. Destro

Robert A. Destro

Points and Authorities in Support of Appellants' Petition for Rehearing

On September 21, 1982 this Court rendered an opinion rejecting appellants First Amendment claims that their religious beliefs forbid them to participate in any way, financially or otherwise, in a University-sponsored abortion subsidy program. Although appellants had informed the clerk's office that oral argument would be requested to clarify what they believe to be the governing legal standards for a case of this type, the case was submitted by the Clerk's office without argument. See Declaration of Robert A. Destro attached to this memorandum. Appellants therefore take this opportunity to present some of those points to the Court and urge that the matter be reheard, with oral argument, and reconsidered by this Court.

ARGUMENT

I. THIS COURT IS BOUND TO CONSIDER THE ASSERTION THAT FEDERAL LAW CONTROLS THE DISCRETION OF THE REGENTS TO MANDATE AN OBJECTING STUDENT'S FINANCIAL PARTICIPATION IN ABORTION SUBSIDIES FOR OTHER STUDENTS

Nowhere in the Court's opinion is there any mention of federal statutory law alleged to control the outcome of this case. 42 U.S.C. §300a7[d,e] applies by its terms since the University of California received over $240 million in F.Y. 1981 alone. The University does not deny its application, and the Supremacy Clause of the United States Constitution requires that it be considered. U.S. Const. Art. VI §2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ..., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of

any State to the Contrary notwithstanding."

The powers of the Regents under Art. IX, sections 9(a,f) are subject to federal constitutional and statutory constraints. Where, as here, federal law expressly prohibits a recipient of federal funds from requiring student participation "in any way," See 42 U.S.C. §300a-7[d,e] in an abortion program, this Court should reconsider the constitutionality of its recognition of power in the Regents to use its state constitutional authority without regard to federal rights.

In Hathorn v. Lovorn, - U.S.-, 50 U.S.L.W. 4664 (1982), the Supreme Court reaffirmed its prior holdings that state courts enjoy concurrent jurisdiction to entertain federal statutory claims. See Gulf Offshore Oil Co. v. Mobil Oil Corp., 453 U.S. 473 (1981). In Hathorn,

the Court held that where, as here, state courts have the power to determine the applicability of federal law, "then it is clear that they also [have] the duty to do so. 'State court, like federal courts, have a constitutional obligation ...to uphold federal law.' Stone v. Powell, 428 U.S. 465, 494 n. 35 (1976) (citing Martin v. Hunter's Lessee, 1 Wheat. 304, 341-344 (1916)." Hathorn v. Lovorn, supra, 50 U.S.L.W. at 4668. Given the holding in Hathorn that where a litigant raises the claim that federal law "renders the contemplated relief unenforceable, ..., the state court must examind [sic] the claim and regrain [sic] from ordering relief that would violate federal law," 50 U.S.L.W. at 4664 (footnote omitted), this Court is bound to reconsider its decision as well as the refusal of the Superior Court to consider the actual (as opposed

to the speculative) impact of federal law on this case. As Justice O'Connor noted in Hathorn, 50 U.S.L.W. at 4664 n. 24, this court could consider the matter independently after ordering the University to answer the assertion, remand for consideration in the Superior Court, or order the parties to solicit the opinion of the Secretary of Health and Human Services regarding the proper interpretation of the statute.

II. THE COURT ERRED AS A MATTER OF LAW AND FACT WITH IT REJECTED APPELLANTS CLAIMS RESPECTING INFRINGEMENT OF RELIGIOUS BELIEFS.

Throughout the Court's opinion runs the statement that appellants failed to show that the University's fee policy "coerced their religious beliefs" (Opinion at 5) because they did not personally have to submit to abortions, join pro-abortion groups, or refrain from expressing their views on abor-

tion. Appellants submit that such an approach misconceives the nature of the First Amendment claim asserted.

It should be clear that the University could not demand direct participation in abortion programs or membership in pro-abortion organizations as a condition for enrollment. This case, however, involves mandatory indirect participation in precisely the same programs and the undisputed assertion by appellants that financial participation does force them to violate fundamental religious beliefs. The University did not dispute appellants' assertion violates their religious beliefs, neither does this Court. Both the Court and the University do, however, question the University's constitutional obligation to accommodate appellants' beliefs that they may not pay, directly or indirectly, for abortions. In Burns v. Southern

Pacific Transp. Co., 589 F.2d 403, 405 (9th Cir. 1979), cert. den. 439 U.S. 1072 (1979), the United States Court of Appeals for the Ninth Circut [sic] held:

> "Burns fully met his burden of proving a prima facie case of religious discrimination in violation of Title VII. He proved he had a bona fide belief that ... the payment of union dues were contrary to the teachings of his church. He informed his employer and his Union about his religious views. He was thereafter threatened with discharge for his refusal to pay union dues and assessments. (Anderson v. General Dynamics Convair Aerospace Division (9th Cir. 1978) 589 F. 2d 397. Thereafter the burden was on the Company and the Union to prove that they made good faith efforts to accommodate Burns religious beliefs, that the efforts were unsuccessful, and that they were unable reasonbly to accommodate those beliefs without undue hardship. (citations omitted). 589 F.2d at 404.

Given the consistent holdings of the Supreme Court in Abood v. Detroit

Board of Education, 431 U.S. 209 (1977) and its progeny in the Ninth Circuit and elsewhere, see, e.g., Burns, supra; Tooley v. Martin-Marietta, Corp., 648 F.2d 1239 (9th cir. 1981); Golda [sic] v. Bloustein, 516 F. Supp. 1142 (D.N.S.J. 1981) (regarding First Amendment duty to accommodate refusal to pay student fees used for ideological purposes), the Court's conclusion that no coercion exists because the means used are purely financial is not supported by relevant case law. It is as appellants make clear in their interrogatories, the payment for abortion which is forbidden. It simply is not appropriate for this, or any, court to "dissect" appellants religious beliefs as it has and hold that objections to financial participation are not. While appellants certainly agree that the University could not compel direct abortion related acti-

vity on their part, the line they draw - financial supportis not unreasonable and it is clearly supportable with reference to religious teachings on abortion. The Supreme Court addressed this very issue in Thomas, supra, when it held:

> "We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs... ***Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.
>
> The narrow function of a reviewing court in this context is to determine whether there was a appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion."

III. THE FIRST AMENDMENT REQUIRES MORE THAN A MERE SHOWING OF "EDUCATIONAL PURPOSE"

The Court's opinion states that the University has proved the educational relationship between an abortion subsidy and student fees. Appellants, however, question this conclusion on both fact and law.

As repeatedly stated by appellants, the fact that the University claims a reason colorably related to education does not override either a First Amendment or federal statutory claim. Wholly apart from the question of fact raised by appellant's interrogatories respecting pro-abortion political activities funded by student fees and the failure of the University to demonstrate the "educational relatedness" of a policy which forces believing students to forego an education at the University rather than pay for a highly controver-

sial and morally repugnant medical procedure, the law is clear regarding the standard of review to be applied in a Free Exercise Case: a "compelling state interest" and no less burdensome alternative, see, e.g., Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 718 (1981), not a mere "educational relationship."*

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said or written on the subject is that only

* To hold that a mere assertion of an "educational relationship" would overcome a religiously based First Amendment claim would convert the high standard of review applied in Free Exercise cases, "compelling state interest" or "substantial relation to a compelling state interest", to the lowest standard of review: "any rational basis." As stated in Thomas above, appellants submit that this is plain error.

> those interests of the highest order can overbalance legitimate claims to the free exercise of religion." Wisconsin v. Yoder, [406 U.S. 205] at 215 (emphasis added).

IV. THE TAXPAYER CASES ARE NOT CONTROLLING

The Court seems to rest its entire holding on the taxpayer cases, e.g., Autenrieth v. Cullen, (1969) 418 F. 2d 586, 588, cert den. 397 U.S. 1063. (Opinion at 6-7). Examination of those cases as well as the facts which are undisputed in this case will demonstrate why the courts would not grant the namely sought.

Applying the rules set out by the Supreme Court for Free Exercise cases to a tax case it is immediately apparent that the federal taxing power is explicitly granted by Article I §8 of the Constitution. Thus, there is not only a compelling state interest, but an

express constitutional grant of authority to the Congress "to lay and collect tasex." [sic] By their nature there is simply no "less burdensome" alternative and the Court has made it clear, at least in recent years, that it will not question facially neutral taxing laws. See, e.g., Sonzinsky v. United States, 300 U.S. 506 (1937); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922). The remedy in such a case is purely political: the electoral process.

In the case at bar, there is no claim that a tax is involved. Appellants do not question either the authority to levy the vee or the validity of using other students' fees to pay for abortions, they simply request accommodation of their belief that they cannot pay part of what is -- and has been admitted to be a "service" fee for services they believe to be morally repug-

nant. The University has no grant of federal power to levy a fee which would overcome a First Amendment challenge, and there are many ways the religious beliefs could be accommodate:

A refund, an exemption, a "check-off," direction of objectors' fees to the non-administrative purposes designated, non-third party payment (i.e., a direct user fee) for abortion, or non-support of any "politically active" student group which is found to sue mandatory fee subsidies to support its political activities. Thus, the University has neither a compelling state interest, nor any ability to show it could not accommodate these Appellants' sincere religious beliefs. It can do so, and should be compelled to make the attempt. These appellants, unlike their federal taxpayer counterparts, have no political remedy against the faceless administrative bureaucracy

which has decreed that all students will help to pay for abortions whether they believe in them or not.

CONCLUSION

For the reasons set forth above, appellants submit that their petition for rehearing should be granted.

Respectfully submitted,

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Brief of Appellants in
California Court of Appeal

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA FOR THE
FOURTH APPELLATE DISTRICT, DIVISION ONE

SUSAN B. ERZINGER, et al.,	)	NO. 4 Civil 24408
Appellants,	)	COURT OF APPEAL FOURTH DIST.
v.	)	FILED MAY 11 1982
REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,	)	KEENAN G. CASADY, Clerk
Appellees.	)	Deputy Clerk

BRIEF OF APPELLANTS

On Appeal from the Superior Court
For San Diego County
The Honorable Franklin B. Orfield, J.,
Presiding
No. 408559

[pages 10-11]

STATEMENT OF ISSUES PRESENTED
FOR REVIEW

A. Is the Superior Court bound by the facts appearing in the record on cross-motions for summary judgment? May the Court take judicial notice of disputed facts which do not appear in the record?

B. Did the Superior Court abuse its discretion by entering summary judgment for the University where the record shows that none of the material facts alleged to support appel-

lants' federal and state constitutional and statutory claims were controverted by the University failed to show that it was entitled to judgment?

C. Did the Superior Court err when it ruled, as a matter of law, that the payment of mandatory student fees cannot result in coerced association forbidden by the First Amendment and other applicable federal law?

The Superior Court so held.
Appellants submit: Yes.

D. May the University of California contitutionally [sic] require all students, as a condition of registration, to participate financially in an abortion subsidy program for other students and to subsidize pro-abortion political activity by other students, where, as here, the students raise sincerely held religious objections to such participation?

The Superior Court held: Yes.
Appellants submit: No.

E. Where, as here, the University admits (and there is no question that it is the recipient of millions of dollars of federal funds), does 42 U.S.C. § 300a-7 require that the University take reasonable steps to accommodate the religious objections of appellants who do not wish to participate in an abortion subsidy program?

The Superior Court did not address the issue.
Appellants submit: Yes.

F. Does Title IX of the Education Amendments to the Civil Rights Act of 1964, 20 U.S.C. §§ 1681 et. seq., require the University of California provide abortion benefits for all students and that students with religious objections to participating in the abortion funding program may be compelled to contribute their fees to defray the cost of the abortion benefits for other students?

The Superior Court held (in effect): Yes.
Appellants sumbit: No. Title IX must be considered in conjunction with 42 U.S.C. § 1983, the Pregnancy Disability Act of 1979, 42 U.S.C. § 2000e(k), and 42 U.S.C. § 300a-7.

Plaintiffs' Brief in Superior Court

[Excerpts from Record v. 4]

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

	) CASE NO. 408559
SUSAN B.	) POINTS AND AUTHORI-
ERZINGER, et al.,	) TIES IN OPPOSITION TO
	) DEFENDANT'S MOTION
Plaintiffs,	) FOR SPECIFICATION
	) THAT CERTAIN ISSUES
-vs-	) ARE WITHOUT SUBSTAN-
	) TIAL CONTROVERSY AND
REGENTS OF THE	) IN SUPPORT OF PLAIN-
UNIVERSITY OF	) TIFFS' MOTION FOR
CALIFORNIA,	) SUMMARY JUDGMENT
et al.,	) Date: April 2, 1980
	) Time: 9:00 A.M.
Defendants.	) Place: Dept. 24

[Excerpts from Record vol. 4]

IV. THE UNIVERSITY MUST DEMONSTRATE BOTH A COMPELLING STATE INTEREST AND NO LESSER ALTERNATIVE TO OVERCOME PLAINTIFFS' FIRST AMENDMENT CLAIMS

A. Introduction

The gravamen of the complaint in this action is that the University's policy which requires all students, including these Plaintiffs', to defray a portion of the cost of others' abortions is both an unconstitutional burden on Plaintiffs' free exercise of religious beliefs and an unconstitutional condition on their attendance at the University of California. For purposes of clarity, these complimentary constitutional theories will be addressed separately.

B. The Regents Have No Interest, Compelling or Otherwise, to Require Contributions for Abortion

1. The University's Arguments Ignore Plaintiffs' First Amendment Claims

D. ACCOMMODATION IS REQUIRED BY FEDERAL AND CALIFORNIA STATUTES

The right of Plaintiffs to accommodation is also supported by the weight of statutory and state constitutional authority. By forcing Plaintiffs to choose between an education at the University of California and their sincerely held moral beliefs when accommodation of those beliefs is possible, the University violates not only its basic charter, but state and federal law as well. Article 9, section 9(f) provides, in relevant part:

> ... The University shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs, and no person shall be debarred admission to any department of the University on account of race, religion, ethnic heritage or sex. (emphasis added)

In essence, the state constitutional provision is merely a guarantee of that which the federal and state constitution already require. Cal. Const. Art. I, §§4, 8. See, e.g., Bakke v. Regents of the University of California, supra; Sherbert v. Verner, supra; Rankins v. Commission on Professional Competence of the Ducor Union School District, --- Cal. 3d ---, 154 Cal. Rptr. 907, 593 P.2d 852 (1979).

* * *

... Congress has also clearly indicated that no person may be denied admission to any entity which receives federal funds because they hold religious views in opposition to abortion. 42 U.S.C. §300a-7 provides an unequivocal statement of Congressional purpose mandating accommodation:

> [(c)](d) Individual rights respecting certain requirements contrary to religious

> beliefs or moral convictions. No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health, Education and Welfare, if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions. 42 U.S.C.S. 300a-7[c](d) (emphasis added)

and the statute quoted above was recently amended by Section 208 of the Nurse Training Act, P.L. 96-76, 93 Stat. 583:

> SEC. 208. Section 401 of the Health Programs Extension Act of 1973 (42 U.S.C. 300a-7) is amended by adding at the end thereof the following new subsection:
>
> "(e) No entity which receives, after the date of enactment of this paragraph, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act, the Community Mental Health Centers Act may deny admission or otherwise discrimi-

> nate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions." (emphasis added)

Plaintiffs submit that each of these statutory provisions imposes an independent duty of accommodation on the University. See Watkins v. Mercy Medical Center, 364 F.Supp. 799, aff'd. 520 F.2d 894 (9th Cir. 1973).

Although Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., does not govern the outcome of this case, it serves as a partial guide for the rule of decision. See Labor Code §1410; Education Code §92150. See generally "Nondiscrimination Statement", Policies applying to Campus Activities,

Organizations and Students. Part A at 23 (Rev. ed. eff. 1979) ...

VI. THE REMEDY WHICH PLAINTIFFS SEEK -- A REFUND AND REDUCTION OF FEES -- IS BOTH CONSTITUTIONALLY MANDATED AND PRACTICAL

Since the controversy over these fees began, it has been made clear to the University that what the students (now Plaintiffs) wanted was merely an exemption from paying that part of the fees attributed to abortion, abortion-related services, and ideological activity, and a refund of the amounts paid for such services to date. The terms of the Third Cause of Action and the prayer for relief call for an accounting to determine the level of funds spent on acitivities [sic] the Plaintiffs have a right to refuse to support. See Parts IV, V, supra.

The remedy procedures sought in the instant case are precisely those

described in Abood v. Detroit Board of Education, supra, and recently adopted by United States District Judge Leland Nielsen in Ellis and Fails v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Case Nos. Civ. 73-113, 118 (U.S.C.D., S.D. Cal., filed March 18, 1980).

Fairly construed, the Complaint merely demands the calculation and reporting of funds expended on ideological activities unrelated to the University's mission (e.g., abortion subsidies or the funding of political interest groups). See Declaration of Robert Burnside, Exhibit 3. Had the Univeristy undertaken the task of calculating the per student refund allocable to abortion services and granted the requested exemption by way of refund and/or check-

off, the vast majority of the claims presented here would be moot.

The University administration has always understood the position of the Plaintiffs as a request for a limited exemption. Deposition of Richard P. Whitehill, August 23, 1978 at 89 (line 22) to 91 (line 12) (attached as Exhibit 3). The amounts attributable to abortion can be calculated in precisely the same fashion as a premium for insurance generally or the amount necessary to fund external fee accounts, see Aff't. of Steven D. Brink, Exhibit 1. And, the amounts attributable to organizations or activities espousing ideological religious or political viewpoints with which Plaintiffs and others may disagree may be calculated by a simple accounting. See, e.g., Declaration of Robert Burnside, Exhibit 2 ....

82-1744

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUSAN B. ERZINGER, et al.,
Petitioners,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I

Whether the assessment by a state university of an educationally-related and neutrally-imposed registration fee violates the free exercise of religion or associational rights of students who object on religious or philosophical grounds to the use of such fees to fund a comprehensive health service, including pregnancy counseling and abortion.

II

Whether the payment of a mandatory registration fee, a portion of which supports a comprehensive health service program at a state university, constitutes compelled participation in the performance of abortions in violation of 42 U.S.C. section 300a-7.

TABLE OF CONTENTS

	Page
Questions presented	i
Statement of the case	1
Reasons for denying the writ	3
I	
The state court of appeal correctly held that the payment of a student fee in support of a comprehensive health service program does not constitute an undue burden upon the free exercise of religion	3
A. The payment of the fee does not force petitioners to identify with beliefs repugnant to their religion	3
B. Just as there is no constitutional right to refuse to pay taxes, some portion of which funds activities objectionable to a taxpayer, there is no constitutional right to refuse to pay a student fee which is used, in part, to fund activities a student finds objectionable	5
II	
Since the lower courts correctly held that no unconstitutional burden existed as a matter of law, no judicial inquiry into the possibility of accommodation was required	7
III	
There is no conflict between the decision below and this court's holding in Abood or the Third Circuit's recent decision in Galda respecting associational rights	9
IV	
The decision of the California court of appeal is entirely consistent with the language and intent of 42 U.S.C. § 300a-7	11
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases

Page

Abood v. Detroit Board of Education, 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977) 2, 9, 10

Arrington v. Taylor, 380 F.Supp. 1348 (M.D.N.C. 1974) aff'd 526 F.2d 587 (4th Cir. 1975), cert denied 424 U.S. 913, 96 S.Ct. 1111, 47 L.Ed. 2d 317 (1976) 10, 11

Associated Students of the University of Colorado v. Regents of the University of Colorado, 189 Colo. 482, 543 P.2d 59 (1975) 11

Autenreith v. Cullen, 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036, 25 L.Ed.2d 647, 90 S.Ct. 1353 (1970) 5, 16

Burns v. Southern Pacific Transp. Co., 589 F.2d 403, cert. denied 439 U.S. 1072, 59 L.Ed.2d 38, 99 S.Ct. 843 (1979) 8

Chaney v. Ahlgren, 346 F.Supp. 869 (E.D.Tenn. 1972) 11

Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974) 12

Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982) 9

Good v. Associated Students of the University of Washington, 86 Wash.2d 94, 542 P.2d 762 11

Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983) 5, 10

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980) 5

San Francisco Labor Council v. Regents of University of California, 26 Cal.3d 785, 163 Cal.Rptr. 460, 608 P.2d 277 (1980) 5

School District of Abington Township v. Schempp, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963) 3

TABLE OF AUTHORITIES CITED

CASES

	Page
Sherbert v. Verner, 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790 (1963)	7
Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 67 L.Ed.2d 624, 101 S.Ct. 1425 (1981)	7
Tooley v. Martin-Marietta Corp., 648 F.2d 1239 cert. denied United Steelworkers of America v. Tooley, 454 U.S. 1098, 70 L.Ed.2d 639, 102 S.Ct. 671 (1981)	8
Torcaso v. Watkins, 367 U.S. 488, 6 L.Ed.2d 982, 81 S.Ct. 1680 (1961)	4
Veed v. Schwartzkopf, 353 F.Supp. 149 (D.Neb. 1973), aff'd without opinion, 478 F.2d 1407 (8th Cir. 1973), cert. denied 414 U.S. 1135, 38 L.Ed.2d 760, 94 S.Ct. 878 (1974)	11
Walz v. Tax Commission, 397 U.S. 664, 25 L.Ed.2d 697, 90 S.Ct. 1409 (1970)	7
West Virginia State Board of Education v. Barnett, 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943)	4
Wisconsin v. Yoder, 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972)	7
Wooley v. Maynard, 430 U.S. 705, 51 L.Ed.2d 752, 97 S.Ct. 1428 (1977)	4

Constitutions

California Constitution, article IX, section 9	5
United States Constitution, First Amendment	12

Statutes

42 U.S.C.:	
Section 300a-7	i, 11
Section 300a-7(b)(1)	1
Section 2000e	8

No.

In the Supreme Court

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OCTOBER TERM, 1982

SUSAN B. ERZINGER, et al.,
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vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Petition for Certiorari in this case follows affirmance by the California Court of Appeal of a decision by the Superior Court of San Diego County that the use of mandatory student fees by the University of California to provide abortion services and pregnancy-related counseling does not infringe Petitioners' rights under the First Amendment. (C.T. 995.)[1]

[1]"C.T." designates the Clerk's transcript. References to the "Transcript of Hearing" in the trial court and to the "Opinion" of the California Court of Appeal are to Petitioners' Appendix (P.A. ....). *(Continued on next page.)*

A comprehensive range of student health services is one of many services funded by mandatory fees assessed on all students at the nine campuses of the University of California.[2] Health plans vary from campus to campus, but all share a common objective: to provide readily accessible health care to students, thereby allowing them to take optimum advantage of their educational opportunities. (C.T. 674-675.)

Pregnancy necessarily affects a woman's physical well-being and may well affect her academic performance. Some women may choose to take their pregnancy to term; others may elect to exercise their right to an abortion. The University provides a health care program that is equally applicable to both alternatives and offers counseling to allow students to make an intelligent choice. The entire health

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The trial court's ruling came on the University's motion for partial summary judgment and was dispositive of claims raised by plaintiffs, except for their third cause of action which asserted that mandatory University fees were being used for "political and ideological activities" in violation of their associational rights under this Court's ruling in *Abood v. Detroit Board of Education*, 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977). That third cause of action was subsequently dismissed by agreement of the parties. (C.T. 957-964.) The Petition for Certiorari mistakenly combines claims properly raised here concerning the University's provision of abortion services with claims unrelated to abortion which allege "political and ideological" activities by fee-supported student organizations. In fact, only allegations concerning University fee support to abortion-related aspects of health service are at issue here. The final judgment below records the voluntary dismissal of issues not adjudicated in the court's April 24, 1980, decision. (C.T. 957-958.)

[2]Others include student financial aid services, educational and vocational counseling, special education programs, communication services, student government, recreation and athletics, and student affirmative action. (C.T. 672-673.)

care program, including these pregnancy-related services, is provided equally to all students and is based on a legitimate educationally-related objective of attempting to minimize the detrimental effects of health care conditions upon a student's academic performance. (C.T. 674-675.)

REASONS FOR DENYING THE WRIT

The decision of the California Court of Appeal is in full accord with federal statutory and case law, including that cited by petitioners in support of their request for certiorari. There is no unsettled question of law nor any conflict in the law which requires the grant of a writ of certiorari in this case.

I

THE STATE COURT OF APPEAL CORRECTLY HELD THAT THE PAYMENT OF A STUDENT FEE IN SUPPORT OF A COMPREHENSIVE HEALTH SERVICE PROGRAM DOES NOT CONSTITUTE AN UNDUE BURDEN UPON THE FREE EXERCISE OF RELIGION

A. The Payment of the Fee Does Not Force Petitioners to Identify with Beliefs Repugnant to Their Religion

A crucial element in establishing a free exercise violation is the presence of coercion. (*School District of Abington Township v. Schempp*, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963).) Both the trial court and the Court of Appeal properly determined, as a matter of law, that no coercion exists in the present case. (Transcript of Hearing, P.A. 35a; Opinion, P.A. 8a-9a.)

Petitioners were not forced to use the abortion or pregnancy counseling services at the University, nor to assist in

any way in the performance of the services to which they object. Petitioners have not been forced into advocating or endorsing any view of abortion or birth control, nor have they been required to associate themselves in any way with the provision of abortion services at the University. No petitioner has been required or encouraged to have an abortion or participate in abortion-related activities, nor has any petitioner been inhibited in the holding or dissemination of his or her views concerning abortion. Petitioners have been asked, as have all other students attending the various campuses of the University of California, to pay a student fee to support the wide range of student services provided by the University to its general student population.

The circumstances here are, therefore, clearly distinguishable from cases where individuals have been unconstitutionally forced to identify themselves with particular views: *West Virginia State Board of Education v. Barnett,* 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943) (compulsory flag salute unconstitutional); *Torcaso v. Watkins,* 367 U.S. 488, 6 L.Ed.2d 982, 81 S.Ct. 1680 (1961) (compelled religious oath unconstitutional); and *Wooley v. Maynard,* 430 U.S. 705, 51 L.Ed.2d 752, 97 S.Ct. 1428 (1977) (compulsory display of vehicle license slogan unconstitutional). Petitioners have not been forced to identify with the provision of abortion services by the University or any other policy decision made by The Regents. They are not compelled to profess any views relative to abortion or pregnancy counseling. Further, those opposing the University's provision of abortion services are free to disassociate themselves

from this practice. (See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980); *Kania v. Fordham*, 702 F.2d 475, 478, fn. 6 (4th Cir. 1983).)

B. Just as there Is No Constitutional Right to Refuse to Pay Taxes, Some Portion of Which Funds Activities Objectionable to a Taxpayer, there Is No Constitutional Right to Refuse to Pay a Student Fee Which Is Used, in Part, to Fund Activities a Student Finds Objectionable

Under the California Constitution (article IX, section 9), The Regents have plenary authority to regulate the internal affairs of the University. (*San Francisco Labor Council v. Regents of University of California*, 26 Cal.3d 785, 163 Cal. Rptr. 460, 608 P.2d 277 (1980).) While petitioners agree that The Regents have such authority, including the authority to assess fees (Petitioners' Brief, pp. 11-12), they claim the right to abstain from paying fees which are used to fund activities they find religiously, morally, or ideologically repugnant. (Petitioners' Brief, pp. 12-13.) As the Court of Appeal correctly noted, all relevant case law is to the contrary.

In *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036, 25 L.Ed.2d 647, 90 S.Ct. 1353 (1970), where the plaintiffs attempted to assert a free exercise claim in opposition to taxes used to support the Vietnam war, the court held:

> "[T]he fact that some persons may object, on religious grounds, to some of the things that government does is not the basis upon which they can claim a constitutional right not to pay that part of their tax." (*Id.*, at p. 588.)

Relying on *Autenrieth, supra*, this Court in *United States v. Lee*, 455 U.S. 252, 71 L.Ed.2d 127, 102 S.Ct. 1051 (1982) recently stated:

> "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs. [Citations] Because the broad public interest in maintaining a sound tax system is of such a high order, *religious belief in conflict with payment of tax affords no basis for resisting the tax.*" (*Id.*, at at p. 134; emphasis added.)

Petitioners' objections here are similar to those of taxpayers who do not wish to participate in any governmental activity which includes support for activities which they find morally, religiously or politically objectionable. The rulings below correctly adopt the reasoning of the taxpayer cases as dispositive of the free exercise issue here. Student fees, like taxes, are assessed uniformly on all participants and are utilized to fund activities which the governing body determines to be in the best interest of its constituency. Whether the assessment is termed a "tax" or a "fee" does not change the right of a governing body to make such assessment.

Further, consistent with the constitutional mandate of neutrality, the student fees at issue here have been assessed uniformly on all students regardless of their religious or philosophic persuasions. (See *Autenrieth, supra*, 418 F.2d at p. 588; *Board of Education v. Allen*, 392 U.S. 236, 20 L.Ed.2d 1060, 88 S.Ct. 1923 (1968).) Petitioners were therefore neither given favorable treatment because of their religious beliefs nor penalized because of them. The First Amendment demands no more.

II

SINCE THE LOWER COURTS CORRECTLY HELD THAT NO UNCONSTITUTIONAL BURDEN EXISTS AS A MATTER OF LAW, NO JUDICIAL INQUIRY INTO THE POSSIBILITY OF ACCOMMODATION IS REQUIRED

In considering a free exercise claim, the initial inquiry focuses on whether a constitutionally improper burden exists. (*Sherbert v. Verner*, 374 U.S. 398, 10 L.Ed.2d 965, 970, 83 S.Ct. 1790 (1963).) Only upon a showing of such a burden must the court consider whether the state's interest is a compelling one and whether less restrictive means are available. (*Sherbert, supra*, 374 U.S. 398; See *Walz v. Tax Commission*, 397 U.S. 664, 25 L.Ed.2d 697, 90 S.Ct. 1409 (1970), *Wisconsin v. Yoder*, 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972) and *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 67 L.Ed.2d 624, 101 S.Ct. 1425 (1981).)[3] As noted above, the payment of a fee for health service does not pose an unconstitutional burden. No inquiry is therefore required into the nature of the University's interest or the possibility of accommodation.

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[3]Nor is petitioners' suggested accommodation consistent with the principles of insurance underwriting. A comprehensive health care insurance program is based upon the proposition that not all students will have need of all services provided, and further that some students may require health benefits far in excess of the contributions made by those students to the program. The theory is that in providing a comprehensive range of health services to the overall student population, one can achieve broader based coverage for a larger number of individuals than could be achieved on an

The Title VII and related employment cases which petitioners cite in support of their accommodation argument are inapplicable. (Petitioners' Brief, p. 33.) Statutory rights under Title VII (42 U.S.C. § 2000e) and related cases, such as *Burns* and *Tooley*,[4] have no relevance to the present case. Petitioners are not employees of the University, nor are any employment-related rights at issue. While Title VII mandates reasonable accommodation by an employer to the religious practices of an employee, no such mandate requires a university to accommodate the religious or philosophic fee paying preferences of its students, absent a violation of constitutional rights. It is apparent that no such violation exists in the present case.

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individual basis. Without the ability to spread the risk of underwriting the cost of anticipated health care services over a larger student population, the University could not provide the broad range of health services it can now make available to its students. This is especially true with pregnancy-related services. Were students given an opportunity to exempt themselves from the provision of such services provided currently by the University, it is likely that only women students would have an interest in participating. This would concentrate the economic burden in providing those services on a much smaller student population, and would therefore pose a serious threat to the availability of pregnancy-related benefits.

Furthermore, petitioners' bold assertion that the amount of health service fees allocated to abortion can be ascertained (Petitioners' Brief, p. 10) does not square with the principles of health insurance underwriting. There is no means a priori to calculate the amount of a premium that will be used for a particular health service.

[4]*Burns v. Southern Pacific Transp. Co.*, 589 F.2d 403, cert. denied 439 U.S. 1072, 59 L.Ed.2d 38, 99 S.Ct. 843 (1979); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 cert. denied *United Steelworkers of America v. Tooley*, 454 U.S. 1098, 70 L.Ed.2d 639, 102 S.Ct. 671 (1981).

III

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S HOLDING IN ABOOD OR THE THIRD CIRCUIT'S RECENT DECISION IN GALDA RESPECTING ASSOCIATIONAL RIGHTS

Petitioners rely primarily upon *Abood v. Detroit Board of Education, supra,* 431 U.S. 209, and its progeny, including the recent Third Circuit decision in *Galda v. Bloustein,* 686 F.2d 159 (3d Cir. 1982), for the proposition that "the government may not condition the receipt of an important public benefit, whether it be education or employment, on the payment of dues or fees to which ideological objections are raised by those forced to pay." (Petitioner's Brief, p. 30.) Petitioners misstate the holdings of *Abood* and *Galda.* The simple presence of ideological objections to the uses of mandatorily-collected fees has, in itself, no constitutional significance. The complaining party must also show that the use objected to is not germane to the purpose of the organization. The court stated in *Abood:*

> "An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan . . . 'The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group strategy' . . . ." (*Abood,*

supra, 52 L.Ed.2d at p. 276; accord, *Galda v. Bloustein, supra,* 686 F.2d 159, 163.[5])

In *Kania v. Fordham, supra,* 702 F.2d 475 (4th Cir. 1983), university students argued that the use of mandatory fees to support a student newspaper violated the principles laid down in *Abood.* In rejecting the students' constitutional claims, and thereby reaffirming its earlier decision in *Arrington v. Taylor,* 380 F.Supp. 1348 (M.D.N.C. 1974) aff'd, 526 F.2d 587 (4th Cir. 1975), cert. denied 424 U.S. 913, 96 S.Ct. 1111, 47 L.Ed. 2d 317 (1976) the court stated:

> "In evaluating the impact of *Abood* on the validity of *Arrington,* it is necessary to focus attention on the specifics of the Supreme Court's decision. The *Abood* court was concerned with labor relations in the public sector, not with the peculiar setting of a student newspaper in a public university. [Footnote omitted.] *Abood* disapproved of mandatory support for the union's ideological causes but specifically upheld the imposition of fees used by the union for its central purpose. [Footnote omitted.] In this case, the university's imposition of student fees is not designed to further the university's ideological biases, but instead to support an independent student newspaper. The university's academic judgment is that the paper is a vital part of the university's educational mission, and that financing it is germane to the university's duties

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[5]The Third Circuit remanded *Galda* in order to ascertain whether the group in question (PIRG) functioned "essentially as a political action group." (*Id.,* at p. 166.) No such assertion is made here. Only allegations regarding the University's fee support for abortion-related aspects of health care are at issue. All other allegations concerning the political and ideological activities of student organizations were voluntarily dismissed. (See Statement of the Case, footnote 1, page 2.)

as an educational institution. (*Kania, supra,* 702 F.2d at pp. 479-480.)

A long line of prior cases has likewise upheld the constitutionality of mandatory student fees provided the funded activities are germane to the University's purposes and such allocation does not amount to a program for promoting only one particular set of views. (*Chaney v. Ahlgren,* 346 F.Supp. 869 (E.D.Tenn. 1972); *Arrington v. Taylor, supra,* 380 F.Supp. 1348 (M.D.N.C. 1974); *Veed v. Schwartzkopf,* 353 F.Supp. 149 (D.Neb. 1973), aff'd without opinion, 478 F.2d 1407 (8th Civ. 1973), cert. denied 414 U.S. 1135, 38 L.Ed.2d. 760, 94 S.Ct. 878 (1974); *Good v. Associated Students of the University of Washington,* 86 Wash.2d 94, 542 P.2d 762; *Associated Students of the University of Colorado v. Regents of the University of Colorado,* 189 Colo. 482, 543 P.2d 59 (1975).)

The University's provision of a comprehensive health service program, including abortion and pregnancy counseling, is germane to the University's mission in providing support services to allow students in need of medical care to continue their education. The use of fees for this purpose therefore meets the test laid down in all applicable cases.

IV

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS ENTIRELY CONSISTENT WITH THE LANGUAGE AND INTENT OF 42 U.S.C. § 300a-7

42 United States Code section 300a-7(b)(1) prohibits discrimination in the "employment, promotion or termination, . . . or . . . in the extension of staff or other privileges to any physician or other health care personnel" because of his or her performance or refusal to perform abortions.

Subsection (d) prohibits the denial of admission or other discrimination against an applicant for training or study, including internships or residencies, "because of the applicant's reluctance, or willingness, to . . . participate in the performance of abortion . . . "

None of the petitioners are physicians or health care personnel alleging discriminatory treatment in the extension of staff or other professional privileges because of their views on abortion. And none are interns or residents who have been denied participation in a course of study because of their reluctance to perform abortions. This statute is therefore clearly inapplicable, as the Court of Appeal properly determined.

Even assuming, arguendo, that the statute were applicable, its clear intent is to ensure neutrality, not to accommodate preferences regarding views on abortions. (See *Chrisman v. Sisters of St. Joseph of Peace,* 506 F.2d 308, 311 (9th Cir. 1974).) The University's neutrality in both the provision of health services and the assessment of mandatory student fees is entirely consistent with this intent. Petitioners cite no relevant legislative history or case authority to the contrary.

CONCLUSION

Petitioners were duly admitted to the University when they met all the entrance requirements. Their views on abortion were and are irrelevant. No petitioner has been required to believe, advocate, participate in, nor identify with the provision of abortion services or pregnancy-related counseling. Petitioners have been required, as are all students attending the University of California, to pay

a registration fee which enables the University to support a wide range of student services. The fact that petitioners disagree with how some portion of such fees are used, no matter how strongly that opposition may be felt, does not give rise to a valid First Amendment claim.

The University's program of comprehensive student health services is educationally-related and religiously neutral. This neutrality should not be disturbed in favor of petitioners' particular preferences.

The decision of the Court of Appeal is entirely consistent with law, and with the strong public policy favoring the University's provision of comprehensive support services which enhance the educational opportunities of its students.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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